Supreme Court, U.S.
FILED
JAN 12 1994
OFFICE OF THE CLERK

No. 93-643

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BESSEMER & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

REPUBLIC STEEL CORPORATION, *et al.*
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENT NATIONAL STEEL CORPORATION

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January 12, 1994

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QUESTION PRESENTED

1. Whether a settlement by the Petitioner of a majority of the Respondents' claims has any impact on the questions presented by the petition for a writ of certiorari?

RULE 29.1 STATEMENT

Respondent National Steel Corporation is owned by NII Capital Corporation (a wholly-owned subsidiary of National Intergroup, Inc.) and NKK U.S.A. Corporation (a wholly-owned subsidiary of NKK Corporation). The non-wholly owned subsidiaries of National Steel Corporation are: Concast Holding A.G.; Iron Ore Company of Canada; Iron Ore Land Company; Mathies Coal Company; The Mesaba-Cliffs Mining Company; Pilot Knob Pellet Company; Presque Isle Corporation; Procoil Corporation.

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On December 13, 1993, this Court directed the parties to file supplemental briefs addressing the impact of the settlements between the petitioner, B&LE, and certain respondents on the questions presented by B&LE's petition for writ of certiorari. Respondent National Steel Corporation ("National") files the following response.

ARGUMENT

In its petition, B&LE argued that this was an "extraordinary antitrust case" deserving of review by this Court in part because the Third Circuit had af-

firmed judgments that were "... more than double the largest judgment previously affirmed in a federal antitrust case." Petition at 1. After filing its petition, B&LE agreed to settle with the two largest judgment-holders by paying a total of $375 million to Republic Steel Corporation ("Republic") and Jones & Laughlin Steel Corporation ("J&L"). B&LE has now also settled the claims of Erie-Western Pennsylvania Port Authority and Codan Corporation (collectively "Erie") and C.D. Ambrosia Trucking Company for an undisclosed amount.

To the extent that B&LE asserted that the size of the judgments affirmed below justified review by this Court, that justification no longer exists. B&LE has now settled approximately 75% of the judgments pending against it.

For the reasons stated in the briefs in opposition to the petition, B&LE's petition should not be granted. As to National, review of its judgment is even less warranted in light of the settlements. B&LE's two questions presented for review concerned the application of this Court's decisions in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). National owned and operated its own fleet of vessels for the transportation of iron ore. Both lower courts held that neither *Keogh* nor *Illinois Brick* had any application to National's claims. B&LE never challenged the lower courts' treatment of National based on its unique factual circumstances and there is no sound basis for this Court to review National's judgment. The settlement of the claims of the parties targeted by B&LE in its petition warrants denial of the petition.

A. Impact of Settlements On B&LE's Question As To Application of *Keogh*.

B&LE's first question presented for review was whether *Keogh* should have barred the claims of the steel companies as "customers" of the railroads whose claims "primarily" involved the rates charged by the railroads. B&LE Petition at (i). Review is not warranted because the Third Circuit expressly held that the "customer" claims were *not* of the type barred by *Keogh* but rather were based on a conspiracy which only "coincidentally implicate[d] rates." Third Circuit Opinion, Pet. App. at 32a. Erie was the only respondent whose claims arguably implicated rates. The settlement of Erie's claims makes review by this Court unnecessary.

In any event, the Third Circuit expressly held that *Keogh* did not apply to National's claims because of National's unique factual position. Third Circuit Opinion, Pet. App. 29a, n.4. Neither B&LE's petition nor its reply contested the Third Circuit's holding on that point. Accordingly, B&LE has waived the right to raise it in this Court.

There is also no sound basis for B&LE's request to extend *Keogh* to claims by competitors. The Court recently refused to review the exact issue now presented by B&LE. *See Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp. of Delaware*, No. 93-549, *cert. denied*, November 29, 1993 (the question presented and denied was "whether the 'filed rate' doctrine enunciated in *Keogh v. Chicago N.R. Co.*, 260 U.S. 156 (1922) bars an antitrust action by one competitor against another?")

B. Impact of Settlements On B&LE's Question As To Application of *Illinois Brick*.

In its second question presented for review, B&LE asks the Court to apply *Illinois Brick* to the claims of the "steel companies" as "indirect purchasers". For the reasons stated in the steel companies' joint brief in opposition, B&LE cannot distort a conspiracy case directed at the steel companies into an *Illinois Brick* posture. Even under the B&LE's incorrect and overly broad interpretation of *Illinois Brick*, however, there is no impact on National's claims. Despite B&LE's indiscriminate use of the term "steel companies," the district court, the Third Circuit and even B&LE below have recognized National's unique factual situation and have acknowledged that *Illinois Brick* simply cannot apply to National's claims because National owned its own fleet of vessels for the transportation of iron ore and suffered direct, unique injury. Third Circuit Opinion, Pet. App. 42a, n. 11; District Court Pretrial Order No. 11, Joint Response App. at 33A-35A; B&LE Appeal Brief at pp. 42-51.

In its ruling on the railroads' motion to dismiss below, the district court held that *Illinois Brick* did not apply because "National's claim for damages in the lake transport market depends on evidence that defendants' actions delayed introduction of the cheaper self-unloader technology by National; it does not implicate any hired lake transportation." Joint Response App. at 33A-35A. The Third Circuit held that B&LE's *Illinois Brick* contentions did not apply at all to National Steel's claims:

> National Steel Corporation, which owned and operated self-unloader vessels, offered substantial evidence that their intent and read-

> iness to enter into the lake transportation business was frustrated by the conspiracy. National Steel actually purchased its own self-unloading vessel, the *Stinson*, in 1974. Because National Steel transported its own iron ore, rather than contracting with outside vessel companies, it did not offer evidence concerning lake transport damages. Also, because it was a vessel owner, notions of indirect injury concerning dock handling charges do not apply to National Steel. Further, National's claim is not jeopardized by the threat of overlapping damages as no other plaintiff suffered this distinct type of injury.

Third Circuit Opinion, Pet. App. p. 42a, n. 11.

CONCLUSION

The petition for certiorari should be denied.

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